

APPENDIX

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

Civil Action No. 1223-73

**NATIONAL COUNCIL OF COMMUNITY MENTAL
HEALTH CENTERS, INC., ET AL.,** on their own behalf
of all others similarly situated,

Plaintiffs,

v.

CASPAR W. WEINBERGER, ET AL.,

Defendants.

ORDER

The Court having entered its Findings of Fact and Conclusions of Law this 28th day of June, 1973, it is hereby

ORDERED:

(1) This matter is certified as a class action under Rules 23(b)(1)(A), 23(b)(1)(B) and 23(b)(2), Fed. R. Civ. P. to include all parties who have submitted applications for initial grants for community mental health center staffing or children's services in fiscal year 1973 under Parts B or F of the Community Mental Health Centers Act, as amended, 42 U.S.C. §§2681, *et seq.*, (hereinafter "the Act").

(2) Plaintiffs' motion for preliminary injunction shall be and hereby is granted,

(3) Defendants Weinberger, Brown and Ash, and their officers, agents and employees, are restrained and enjoined from carrying out defendant Brown's directive of February 23, 1973.

(4) Defendants Weinberger, Brown and Ash, and their officers, agents and employees, are enjoined and man-

dated to take all actions necessary to review and process all applications pending for community mental health center staffing and children's services grants, and, without delay, award grants by Notice to Grant or other lawful means to all applicants found to be qualified pursuant to the same lawful eligibility requirements on the same basis as they were applied by the defendants prior to February 23, 1973. Final review and processing of all pending applications shall be completed no later than June 30, 1973.

(5) Defendants shall take all actions, including issuing Notices to Grant, necessary to obligate funds under the Act for community mental health center staffing and children's services grants no later than June 30, 1973, for all duly approved pending applications.

(6) The defendants shall, not later than June 30, 1973, take all actions necessary duly to record as an obligation of the United States pursuant to 31 U.S.C. §200 the amount representing the differential between the \$165,100,000 appropriated for community mental health center staffing grants under the Act and the sum obligated by June 30, 1973, for continuation staffing costs, and the amount representing the difference between the \$20,000,000 appropriated for children's services costs.

(7) The defendants shall, not later than June 30, 1973, take all actions necessary duly to record the sums described in paragraph (6), above, as expended pursuant to all laws, including 31 U.S.C. §200, and retain said sums in an account earmarked as so expended in the name and credit of this Court.

(8) The sums described in paragraph (6), above, and duly recorded as obligated and expended, shall remain so until further Order of this Court and resolution of

this case on its merits and the defendants shall take all actions necessary to achieve that result.

(9) All parties shall submit any additional papers for the Court's consideration of this matter on the merits by July 15, 1973, and the Court will then enter a Final Order viewing the case as one presented on cross-motions for summary judgment on the record and pleadings.

(10) Since no funds will leave the treasury of the United States, plaintiffs need only post a cash or surety bond of \$250.00

/s/ Gerhard A. Gesell

UNITED STATES DISTRICT JUDGE

June 28, 1973.

**NATIONAL COUNCIL OF COMMUNITY MENTAL
HEALTH CENTERS, INC., et al., on behalf of
themselves and others similarly situated, Plaintiffs,**

v.

**Caspar WEINBERGER et al.,
Defendants.**

Civ. A. No. 1223-73.

**United States District Court,
District of Columbia.**

Aug. 3, 1973.

*** * ***

**Jerome S. Wagshal, Pearce & Wagshal, Washington,
D.C., for plaintiffs.**

**Kenneth A. Rutherford, Atty., Dept. of Justice,
Washington, D.C., for defendants.**

MEMORANDUM OPINION

GESELL, District Judge.

Plaintiffs as a class bring this action seeking an order requiring defendants to review, approve, and obligate to the plaintiffs funds in the amount of \$52,050,000 for first-year grants for staffing of community mental health centers and for construction and staffing of mental health treatment centers for children under the Community Mental Health Centers Act, as amended, 42 U.S.C. §§ 2688-2688d, 2688u (hereinafter referred to as the Act). The class, certified by the Court under Rule 23, Fed.R.Civ.P., consists of all those having applied for first-year grants under these provisions of the Act.

Defendants have moved to dismiss this action on the grounds that the Court lacks jurisdiction over the subject

matter of this action; that plaintiffs have failed to join an indispensable party; that there is no justiciable case or controversy presented by this action; and that the complaint fails to state a claim upon which relief can be granted. In addition, plaintiffs and defendants have each cross-moved for summary judgment as a matter of law. The issues have been thoroughly briefed and the underlying facts are not in dispute.

Administration of the Act lies with the Secretary of the Department of Health, Education and Welfare (HEW). The Regional Offices of HEW review applications and then send them to the National Advisory Mental Health Council for approval. If that approval is obtained, each of the ten HEW Regional Directors then makes the final determination on which of the applications as recommended favorably by the National Advisory Mental Health Council will be finally approved for award, the amount to be awarded, and the priority order for payment. Accordingly, although a Regional Health Director may not award a grant that has not been recommended for approval by the National Advisory Mental Health Council, a favorable recommendation by the National Advisory Mental Health Council neither constitutes effective approval of a grant application nor obligates the respective Regional Health Directors to award a grant to the applicant.

On February 23, 1973, the Director of the National Institute of Mental Health issued a directive to the HEW Associate Regional Directors for Mental Health which in pertinent part:

(1) Noted that because of the revised 1973 budget "no new staffing grants will be awarded in 1973."

(2) Noted that "[a]ll activities of the Regional Offices pertaining to the development of additional staffing grant applications should be discontinued since they cannot be funded."

(3) Discouraged potential applicants for grants from making application: assistance in the form of "staffing application kits" was directed "not [to] be distributed to potential applicants;" applications received and not yet reviewed were not to be "site visited or reviewed for funding but should be acknowledged to the applicant in a letter explaining the reason the application will not be reviewed . . . ;" staffing grant applications already reviewed by the Regional Office were ordered "not [to] be duplicated or presented to the National Advisory Mental Health Council."

As of February, 1973, a total of 77 grant applications had been recommended for approval by the National Advisory Mental Health Council, in total sum of \$39,026,565, and many other applications had been received and were under review, or had been initially approved by Regional Directors. After February 23, 1973, defendants ceased procuring and developing first-year grant applications by members of the plaintiff class and applications have not been processed or developed. No action was taken by defendants after February 23, 1973, to obligate or expend funds for the 77 approved grant applications, or for any other first-year grant applications in fiscal 1973, although the defendants made available funds in fiscal 1973 to applicants to meet the continuation costs of previously funded grants.

By continuing resolution, for fiscal year 1973 Congress has appropriated for obligation and expenditure the sums of \$165,000,000 for Community Mental Health Center staffing and \$20,000,000 for Mental Health for Children.¹ Although approximately \$52,050,000 of this appropriation is available for funding first-year grant

¹86 Stat. 402 (1972), as amended, 86 Stat. 563, 746, 1204 (1972) and 87 Stat. 7 (1973); H.R. 15417, 92d Cong., 2d Sess. (passed June 15, 1972).

applications, none of this amount has been obligated or expended as of the date of suit. On June 28, 1973, the Court entered a preliminary injunction ordering defendants to review and fully process by normal criteria all pending applications, and to take measures necessary under 31 U.S.C. § 200 to prevent all unobligated and unspent funds for the first-year grant programs from lapsing at the end of fiscal 1973, and thus returning to the general treasury fund pursuant to 31 U.S.C. § 701(a) (2).

Before turning to the merits, the issues raised by defendants' motion to dismiss must be considered.

The defendant Government officials raise standard objections so typical in these cases and many other categories of current Government litigation. They plead sovereign immunity and say that citizens directly affected as potential beneficiaries of appropriations have no standing to complain because these appropriation matters raise transcendent political issues which a Federal Court should not venture to resolve.

It is time this litany was displaced by a modicum of common sense. When Congress directs that money be spent and the President, as Chief Executive, declines to permit the spending, the resulting conflict is not political. The President, after being advised, believes he has the power because of economic conditions and other reasons to refuse to spend at his discretion. Yet he is charged by the Constitution faithfully to execute the laws. If the President is in all good faith mistaken as to the meaning and effect of the law or his inherent power under the Constitution, what is more normal and consistent with our American system of government than for the courts to interpret the law and thus resolve the apparent conflict one way or the other.

This dispute can readily be resolved by the customary exercise of judicial power, and therefore is not a nonjusticiable political question. *Powell v. McCormack*, 395 U.S. 486, 89 S.Ct. 1944, 23 L.Ed.2d 491 (1969); *Baker v. Carr*, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962). Furthermore, any affirmative order of this Court would be premised on a determination that official action by the defendants in refusing to spend is beyond their statutory or constitutional powers. This would go no further than to require the spending of funds already appropriated by Congress to achieve the declared purposes of the Act. Accordingly, there can be no effective assertion of sovereign immunity and the defendants' actions are reviewable by the courts. See *Dugan v. Rank*, 372 U.S. 609, 83 S.Ct. 999, 10 L.Ed.2d 15 (1963); *Largon v. Domestic & Foreign Corp.*, 337 U.S. 682, 69 S.Ct. 1457, 93 L.Ed. 1628 (1949); *Scanwell Laboratories, Inc. v. Shaffner*, 137 U.S.App.D.C. 371, 424 F.2d 859 (1970). The Court has jurisdiction pursuant to 5 U.S.C. §§ 701-706, and 28 U.S.C. §§ 1331 and 1361.

An issue of statutory interpretation and constitutional construction is presented. To say that the Constitution forecloses judicial scrutiny in these circumstances is to urge that the Executive alone can decide what is best and what the law requires. To say that persons immediately and seriously affected by failure to commit funds, authorized by the Legislature cannot go to court is to ignore the democratic base of our society. Indeed, it is only when the three equal and coordinate branches of government function that a stable government can be assured. *Cf. Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803). The rule of law dictates calm judicial determination rather than political confrontation. Such confrontations are either resolved by naked

power utilized in many irrelevant ways, or the issue stalemates. We are a government of law, not men, and the law must be determined and upheld. This is the neverending process by which the Constitution is molded to the exigencies of the times and will be made rational in this and succeeding centuries. These cases should move to higher courts for prompt, definitive determination shorn of the confusing inconsequential defenses so typical of Government legalese these days. The defendants' motion to dismiss is denied.

The controlling question on the merits is whether the money authorized under the legislation was appropriated to be spent at the discretion of the Executive, or appropriated with an affirmative direction that the money be fully spent within the fiscal year. This issue is to be resolved without regard for the merits or demerits of the particular program involved, although it is perhaps of some significance in weighing the matter to note that this particular appropriation does not affect our foreign or military affairs. Rather, it falls squarely in an area of domestic concern in which the President's responsibility to execute the laws must be viewed without regard to issues of national defense or foreign policy, where the Constitution may recognize some special authority of the President to deal with developing conditions.

The defendants emphasize the overall economic problems confronting the nation, the heavy demand for funds in areas where national security considerations abound, and the absence of any national procedure for reconciling various appropriations in the light of current budgetary pressures, in part exacerbated by debt limitations. All of this is indeed pertinent, but whatever may be the President's power to limit expenditures to accommodate the total moneys available, he does not have complete discretion to pick and choose between pro-

grams when some are made mandatory by conscious, deliberate congressional action. At least with respect to the programs involved here, there is no basis for defendants' assertion of inherent constitutional power in the Executive to decline to spend in the face of a clear statutory intent and directive to do so. *Kendall v. United States ex rel. Stokes*, 37 U.S. 524, 9 L.Ed. 1181 (1838); *Youngstown Street & Tube Co. v. Sawyer*, 343 U.S. 579, 72 S.Ct. 863, 96 L.Ed. 1153 (1952); *State Highway Comm'n v. Volpe*, 479 F.2d 1099 (8th Cir. 1973); *Local 2677, Am. Fed'n Gov't Employees v. Phillips*, 358 F.Supp. 60 (D.D.C. 1973).

The Court concludes that Congress intended to require a full commitment of the fiscal 1973 appropriated funds by the end of the fiscal year. This intent is established by the following facts and circumstances, among others.

Through the Act, Congress has constructed an elaborate scheme to advance the cause of community mental health treatment, and has continually appropriated money to achieve the purposes of the Act. The object of the Act is to provide federal money to establish new community mental health centers and programs throughout the nation. Once begun, the federal moneys continue to be available in succeeding years at somewhat reduced levels. In extending the program to make available initial grants in additional fiscal years, Congress has necessarily also permitted additional centers to be eligible for the substantial succeeding year grants. In the face of vast unmet mental health needs throughout the nation, Congress has continuously appropriated money for new grants to extend the benefits of the Act. The Act was never viewed by Congress as a demonstration program to get communities to follow the examples of others and start their own centers, but rather a national effort to

redress the presently wholly inadequate measures being taken to meet increasing mental health treatment needs.²

The defendants' present efforts to shut down these programs, perhaps in favor of others, on the grounds these initial general funding grants were for demonstration programs and have served their purpose, is not only inconsistent with the Act, its continuing support and expansion by Congress, and the congressional intent found in the legislative history, but is a view recently explicitly rejected by Congress in extending the programs, with appropriations, through fiscal 1974, so that community facilities can be further expanded³ Therefore, while the internal language of this Act is "discretionary," it would appear Congress did not intend that the Executive shall have discretion simply to end the program in total without regard to the essential purposes of the Act. *See State Highway Comm'n v. Volpe, supra.*

Given this intent, the question then arises whether this intent was anywhere made sufficiently explicit by the statutes as to constitute a mandatory directive to the President. Subsequent to the passage of the Act, an amendment (herein after "Section 601") was enacted which provided as follows:

²*See, e.g.,* S.Rep.No. 92-1064, 92d Cong., 2d Sess. 38-49 (1972); S.Rep.No. 91-583, 91st Cong., 1st Sess. (1969); H.R.Rep. No.91-735, 91st Cong., 1st Sess. (1969); S.Rep.No.294, 90th Cong., 1st Sess. (1967); H.R.Rep.No.212, 90th Cong., 1st Sess. (1967), U.S.Code Cong. & Admin. News 1967, p. 1252; S.Rep.No.366, 89th Cong., 1st Sess. (1965); H.R.Rep.No.248, 89th Cong., 1st Sess. (1965), U.S.Code Cong. & Admin. News 1965, p. 2401; S.Rep.No.180, 88th Cong., 1st Sess. (1963); H.R.Rep.No.694, 88th Cong., 1st Sess. (1963), U.S.Code Cong. & Admin. News 1963, p. 1054.

³Health Programs Extension Act of 1973, Pub.L.No. 93-45, §§203 and 207, 87 Stat. 94 (June 18, 1973); 87 Stat. 130 (1973); H.R.Rep.No.93-227, 93d Cong., 1st Sess. 10 (1973).

Notwithstanding any other provision of law, unless enacted after the enactment of this Act expressly in limitation of the provisions of this section, funds appropriated for any fiscal year ending prior to July 1, 1973, to carry out any program for which appropriations are authorized by . . . or the Mental Retardation Facilities and Community Mental Health Centers Construction Act of 1963 (Public Law 88-164, as amended) *shall remain available for obligation and expenditure until the end of such fiscal year*. Medical Facilities Construction and Modernization Amendments of 1970, Pub.L.No. 91-296; Title VI, §601, 84 Stat. 353, 42 U.S.C.A. § §201 note and 2661 note (emphasis added).

While the meaning of the language "shall remain available for obligation and expenditure until the end of such fiscal year" is not readily apparent on its face nor free from doubt, read in the light of the legislative history of Section 601 and the meaning commonly given and accepted for such language,⁴ the Court must conclude that this provision makes mandatory the spending of funds appropriated under the Act for fiscal 1973.

Before initial passage by Congress, the Executive recognized that all other statutory provisions notwithstanding, Section 601 converted "HEW health-related programs into mandates to spend regardless of considerations of commonsense economy and prudent use of the taxpayers' money." Letter from Robert P. Mayo, Director, Bureau of the Budget, to Rep. Harley D.

⁴Language like that used in Section 601 has previously been used by Congress with the intent to make mandatory the spending of appropriated funds. Such an intent of similar language has been recognized by the Executive, and the courts have so interpreted it. See 20 U.S.C. §1226 and 23 U.S.C. §118(a); S.Rep.No. 91-634, 91st Cong., 2d Sess. 78-79 (1970); 114 Cong.Rec. 29014-16 (1968) (remarks of Senators Morse and Yarborough); State Highway Comm'n v. Volpe, *supra*.

Staggers, May 11, 1970. This section was originally a Senate amendment and its mandatory nature was agreed to by the House conferees only after it was limited to funds for fiscal years through 1973 and to the three health programs with the greatest needs. Moreover, the floor debates and committee reports reflect a clear understanding that Section 601 made spending mandatory "to prevent administration imposed freezes, reductions and rollbacks from applying to health programs." H.R.Rep.No.91-1167, 91st Cong., 2d Sess. 25-26 (1970). See 116 Cong.Rec. 22266, 22267, 22268, 22271-73 (1970) (remarks by Senators Yarborough, Dominick, Javits and Kennedy). The President vetoed Section 601 principally because Congress was insisting that fiscal 1973 funds "to carry out the programs involved must be spent." 116 Cong.Rec. 20876 (1970) (Veto Message of President Nixon). With this meaning clearly in mind, Congress overrode the President's veto. Finally, with this legislative background and the current debate over Executive spending well in mind, Section 601 has recently been extended through fiscal 1974. The Health Programs Extension Act of 1973, Pub.L.No. 93-45, §401(a), 87 Stat. 95 (June 18, 1973). In so doing, the committee reports make explicitly clear that the language in question here requires the expenditure of funds. H.R.Rep.No.93-227, 93d Cong., 1st Sess. 10 and 15 (1973).

Money has been appropriated to achieve the purposes of the Act and the defendants are given the non-discretionary statutory duty to spend those funds for grants that meet the pre-February 23, 1973, lawful criteria embodied in rules and regulations promulgated to achieve the purposes of the Act. The defendants have no residual constitutional authority to refuse to spend the money. Accordingly, the plaintiffs' motion for summary

judgment is granted and the motion of defendants for summary judgment is denied. An appropriate Final Order accompanies this Memorandum Opinion.

As to the question of relief, the Court must address one point pressed by plaintiffs. Because the Act, Section 601, and supporting appropriations have in effect been carried over to fiscal year 1974 (87 Stat. 94 and 95, §§203, 207, 401(a) (1973), and 87 Stat. 130 (1973)), plaintiffs seek relief applicable to fiscal year 1974 as well as 1973. The Court must decline such relief. There is no controversy as to fiscal 1974 before the Court and ripe for determination. Congress has various proposals under consideration which may affect this controversy, and the Executive has substantial time in which to formulate a position on expenditure of 1974 funds before new applicants would face injury. If and when such injury is real, those aggrieved can proceed by a separate action.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1223-73

NATIONAL COUNCIL OF COMMUNITY MENTAL
HEALTH CENTERS, INC., ET AL., on behalf of
themselves and others similarly situated,

Plaintiffs,

v.

CASPAR WEINBERGER, ET AL.,

Defendants.

FINAL ORDER

In accordance with the Court's Memorandum Opinion
filed this day, it is hereby

ORDERED that on or before September 1, 1973, de-
fendants shall:

(1) take all steps necessary to review under normal
procedures and criteria in effect prior to February 23,
1973, all pending applications for first-year grants for
community mental health centers staffing, initiation and
development, and for construction and staffing of men-
tal health treatment centers for children under the Com-
munity Mental Health Centers Act, as amended, 42 U.S.C.
§ § 2688-2688d, 2688u;

(2) submit all qualifying applications reviewed by HEW
Regional Offices to the National Advisory Mental Health
Council for approval;

(3) decide, through Regional Directors or otherwise,
but in accordance with all regulations and requirements
in effect prior to February 23, 1973, which grant appli-
cations approved by the National Advisory Mental Health
Council shall be funded and in what amount, in order

that the full \$52,050,000 of appropriated funds available shall be awarded in grants;

(4) take all steps and prepare all documents necessary legally to notify grantees of their awards under (3) above and to obligate to said grantees their share of \$52,050,000 appropriated for expenditure;

(5) take the necessary steps to send by check to grantees their grant awards in accordance with established funding control procedures; and it is

FURTHER ORDERED that this Order shall not be stayed by this Court pending appellate review and plaintiffs shall have their normal costs for this litigation.

/s/ Gerhard A. Gesell

UNITED STATES DISTRICT JUDGE

August 3, 1973

**NATIONAL COUNCIL OF COMMUNITY
MENTAL HEALTH CENTERS, INC.,
et al., Plaintiffs,**

v.

**Caspar WEINBERGER, et al.,
Defendants.**

Civ. A. No. 1223-73

**United States District Court,
District of Columbia.**

Dec. 20, 1974.

*** * ***

Jerome S. Wagshal, pro se.

Guy W. Shoup, Eliot S. Gerber, New York City, Patrick J. Moran, Washington, D.C. for NCCMHC.

Bruce Titus, Dept. of Justice, Washington, D.C., for defendants.

MEMORANDUM AND ORDER

GESELL, District Judge.

One hundred thirty-eight community mental health centers, certified by the Court as a class under Rule 23(b) (1) and (b) (2) of the Federal Rules of Civil Procedure, prevailed in this action to set aside an impoundment order. As a result, the Secretary of Health, Education and Welfare released previously withheld appropriations amounting to \$52 million which Congress had previously authorized for fiscal 1973. National Council of Community Mental Health Centers, Inc. v. Weinberger, 361 F.Supp. 897 (D.D.C. 1973). Shortly after the appeal from that order was abandoned, various related petitions were filed asking the Court to order that Jerome A.

Wagshal, Esquire, attorney for the named representatives of the class, be compensated by H.E.W. or the class for his services. Voluminous papers, including affidavits, were filed, testimony was taken and notice given by mail to all members of the class.

The original complaint and applications by both the class and Mr. Wagshal ask attorney's fees on behalf of the class from the Government defendants. The law is settled that, in the absence of specific statutes to the contrary, attorney's fees may not be awarded against the Government. 28 U.S.C. §2412; *United States v. Chemical Foundation*, 272 U.S. 1, 20, 47 S.Ct. 1, 71 L. Ed. 131 (1926); *United States v. Worley*, 281 U.S. 339, 50 S.Ct. 291, 74 L.Ed. 887 (1930); *Pyramid Lake Paiute Tribe v. Morton*, 499 F.2d 1095 (D.C.Cir. 1974), cert. denied — U.S. —, 95 S.Ct., —, 42 L.Ed.2d — (1975). This rule applies with equal force in cases nominally brought against officers of the Government relating to their official duties. See 6 J. Moore, *Federal Practice* (2d ed. 1971) ¶54.75[4].

While it would be equitable in this instance to require the Government to compensate the members of the class for their legal expenses incurred in a suit to obtain appropriated funds wrongfully withheld by the Executive Branch, the Court lacks the power to do so since there is no authorizing statute.

In another application, Mr. Wagshal asks the Court to assess attorney's fees for his personal benefit against the members of the plaintiff class *in personam*. The Court also lacks the power to do this. Unlike an action *in rem*, where control of the *res* coupled with mail notice has been held to satisfy due process, *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950), the power of a court to render binding *in personam* judgments depends on personal

jurisdiction which is usually acquired via service of process. See *Pennoyer v. Neff*, 95 U.S. 714, 24 L.Ed. 565 (1878). However, in class actions, it has been recognized that the power of the Court to render binding *in personam* judgments consistent with due process finds its source in the presence of adequate representatives of the class before the court even though no process was served. *Hansberry v. Lee*, 311 U.S. 32, 61 S.Ct. 115, 85 L.Ed. 22 (1940). In such circumstances, however, the Court must "carefully scrutinize the adequacy of representation." 3B J. Moore, *Federal Practice* (2d ed. 1974) ¶ 23.07[1] at 23-357; *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 562 (2d Cir. 1968) (*Eisen II*). This is particularly true in a case such as the present one where the class was not structured as a (b) (3) class, and class members were never given an opportunity to opt out of the litigation. See *Appleton Electric Co. v. Advance-United Expressways*, 494 F.2d 126, 140 (7th Cir. 1974).

While it is true that the Court earlier certified the named plaintiffs as adequate representatives of the class under Fed.R.Civ.P. Rule 23(b) (1) and (b) (2) for purposes of the merits of the original action, that phase of the action presented quite different questions. The Court was not advised or aware at the time of certification that attorney's fees would be sought from benefiting class members.¹ See Fed.R.Civ.P. Rule 23(c)

¹Mr. Wagshal was originally retained to bring this litigation by the National Council of Community Mental Health Centers, Inc., an association of some, but not all, the community mental health centers which comprise the class. The agreement between the National Council and Mr. Wagshal, of which the Court was unaware until the present applications were filed, provided that the National Council would pay Mr. Wagshal, a minimum hourly fee and expenses, but that in the event the litigation was successful, an application would be made for an additional fee to be fixed by the Court "in an appropriate amount" from benefiting class members. A series of letters from the National Council to members of the class advised them informally of this arrangement, although it cannot be said they all agreed to it or understood its implications.

(4) (A), Rule 23(c) (1); Local Rule 1-13(a) (2) (ii).

The Court in its discretion has determined that the representation of class members has been inadequate to support *in personam* judgments for attorney's fees against the class members. None of the community mental health centers originally named as plaintiffs and certified as representatives of the class has appeared by separate attorney in the portion of the case relating to Mr. Wagshal's fee applications. See 3B J. Moore, Federal Practice, *supra*, ¶ 23-07[1] at 23-360, n. 39. While the National Council did eventually retain separate counsel in the fee proceedings, it has expressly disclaimed the ability to represent the class. Moreover, it is not a member of the class since it received no funds released by this litigation, see *Bailey v. Patterson*, 369 U.S. 31, 32-33, 82 S.Ct. 549, 7 L.Ed.2d 512 (1962), and its interests are antagonistic to those of the class on several issues because, among other things, it is seeking return of the fees it has already advanced to Mr. Wagshal as front money. See 3B J. Moore, Federal Practice, *supra*, ¶¶ 23-07[2], [3]. No adequate representative of the interests of the class being present in this proceeding, the Court is unwilling and unable to enter *in personam* judgments against the members of the class.²

Payment of attorney's fees is also sought through still another route. The record discloses that a portion of the money released by the litigation remains unused. The amount is more than sufficient to pay any reasonable attorney's fee in this situation and is still subject to the Court's control as a result of orders entered during the

²This problem in no way affects the Court's power to award fees against a fund, see *infra*, since this power is *not* founded on the existence of a class action. See *Sprague v. Ticonic Nat. Bank*, 307 U.S. 161, 167, 59 S.Ct. 777, 83 L.Ed. 1184 (1939).

proceedings, even though the precise accounting as to this sum must await final auditing.

It remains, therefore, to determine whether attorney's fees can be assessed against this unexpected fund held by H.E.W. The law is settled that where a fund has been created in litigation with the Government, and the Government stands as it does here in the position of a stakeholder required to pay over that fund to qualified beneficiaries, the Court may award a portion of it to the attorney for the beneficiaries as "costs between solicitor and client." *Lafferty v. Humphrey*, 101 U.S.App.D.C. 222, 248 F.2d 82, cert. denied sub nom., *Benton County v. Lafferty*, 355 U.S. 869, 78 S.Ct. 118, 2 L.Ed.2d 75 (1957); *Emmet v. Whittier*, 164 F.Supp. 563 (D.D.C.1958). See also, *United States v. Anglin & Stevenson*, 145 F.2d 622, 629 (10th Cir. 1944). Thus the Court has authority to reimburse the actual plaintiffs or their lawyer for their efforts on behalf of the class by assessment for attorney's fees against the fund.³ *Paris v.*

³H.E.W. also contends that a final order was entered and that Rule 59(e) prohibits reopening for consideration of attorney's fees after ten days. The class by its representatives petitioned for attorney's fees from the outset. The rule does not apply where costs in the form of attorney's fees are sought by the eventually successful party from a common fund created by the litigation. See 6 J. Moore, *Federal Practice* (2d ed. 1971) ¶54.77[2]. Not only are costs usually taxed only after appeal, but in a fund case judicial economy requires that the viability of the fund be first established finally before expenses to be taxed against it are considered. See 6 J. Moore, *Federal Practice* (2d ed. 1971) ¶54.77[9].

The case of *Stacy v. Williams*, 50 F.R.D. 52 (N.D.Miss.1970), affirmed, 446 F.2d 1366 (5th Cir. 1971), relied on by defendant, is not to the contrary. That case followed *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 87 S.Ct. 1404, 18 L.Ed.2d 475 (1967), which in turn explicitly recognized the "common fund" cases as an exception to the American rule that attorney's fees are not generally part of the prevailing parties' costs. See 386 U.S. 718-719, 87 S.Ct. 1404.

Metropolitan Life Ins. Co., 94 F.Supp. 792 (S.D.N.Y.1947); Lafferty v. Humphrey, *supra*.

The applications may fairly be construed to include an application by the named plaintiffs to be reimbursed for legal expenses incurred by them as representatives of the class in creating a fund for the benefit of the class as a whole. Fed.R.Civ.P. Rule 8(f). Since such a fund still exists, the applications viewed in this light will be granted for it is clear that the representatives of the class incurred legal expenses in creating the fund for the benefit of all class members. Trustees v. Greenough, 105 U.S. 527, 26 L.Ed. 1157 (1882); Mills v. Electric Auto-Lite Co., 396 U.S. 375, 389-397, 90 S.Ct. 6161, 24 L.Ed.2d 593 (1970); Hall v. Cole, 412 U.S. 1, 93 S.Ct. 1943, 36 L.Ed.2d 702 (1973); Annot., 38 A.L.R.3d 1386 (1971); J. Dawson, "Lawyers and Involuntary Clients: Attorney Fees from Funds," 87 Harv.L.R. 1597 (1974).

It is recognized that this will reduce the fund by the amount of the fee awarded and that under the budget and accounting procedures of H.E.W. this may affect the sum available in the next fiscal year for similar grants. Nothing herein shall be taken in any way to restrict or to limit the right of H.E.W. to reduce future grants to members of the class by their pro rata share of the fee paid from the fund.

The substantial material received from members of the class following notice and presentation by new counsel for the National Council as well as Mr. Wagshal provide sufficient basis for the Court to proceed to fix a fee.⁴

⁴"H.E.W. has not indicated any view as to the appropriate amount of a fee and sought to be heard later on this question if a fee is to be awarded against the fund. Counsel for H.E.W. was informed prior to the October 31, 1974, hearing that he should

[footnote continued]

This litigation involved a fairly narrow controversy. It was resolved without trial by motions over a period of a month and a half, although Mr. Wagshal spent additional time in legislative efforts involving this and other cases. Mr. Wagshal's clients were and are well satisfied with his professional efforts and as far as his work on the merits is concerned, it was of high quality. He seeks a fee of \$1 million. The National Council suggests an additional fee of \$43,979; some members of the class opposed any fee, while some indicated a willingness to pay a pro rata share of a fee that would range upwards somewhat beyond \$100,000.

Mr. Wagshal strenuously urges that he not be compensated on a time basis. He contends that he took the retainer, after several other attorneys had refused, primarily on a contingent basis and since the contingency eventuated he should be paid solely in relation to the sum released from impoundment, here approximately \$52 million. There is no merit in this suggestion. *See Ratner v. Bakery & Confectionary Workers Union*, 122 U.S. App.D.C. 372, 354 F.2d 504, 506 (1965) (rejecting a "pro forma scale" for fixing attorney's fees on a quantum merit basis). The amount released was determined by Congress, not by the litigation. The only contingency was whether or not the plaintiff class would win or lose. In other words, his work contributed in no way to the amount of the award but only to the fact of the award itself. If he lost he would have received only the "front money" under his agreement with the National Council. Since he won he should receive recognition for the result but not on any percentage computation based on the recovery.

submit whatever he wished regarding the amount of the fee at said hearing, and counsel also was given the opportunity to submit a post-hearing brief on this matter. In any event, H.E.W. is a mere stakeholder and its views are immaterial."

Mr. Wagshal also contends that the Court as a matter of policy should award a fee "at the outer limit of reasonableness" to encourage other private attorneys to undertake litigation of a public interest nature. He points out that some of this type of litigation is unpopular (this was clearly not such a case) and such causes are not always well compensated. He urges that a fee of \$1 million would be at the level which he believes large firms would have charged commercial clients and feels his routine time charges contrast unfavorably with these fee charges and the compensation of professional athletes and other personalities. This line of argument is rejected. It is not the function of the Court in setting fees to do more than provide reasonable compensation for work done. Mr. Wagshal should be reasonably paid for his useful time, plus a bonus for the result. Nothing more is warranted, particularly where the fee is to be paid from funds appropriated by the Congress for a far more useful purpose, assistance to the mentally ill.

Upon a careful examination of Mr. Wagshal's account of time logged, a number of problems immediately are presented. As a sole practitioner, his work was at many different gradations of professional responsibility and no flat hourly rate can reasonably be applied to his work as a whole. A considerable amount of his time presentation is based upon loose estimates. It is also striking to note that more than half the time claimed is to compensate him for his efforts to obtain compensation. While the Court must, of course, consider time required to obtain compensation, it is apparent that Mr. Wagshal has spent considerably more time in this direction than the situation required. His fee papers are prolix, repetitive and excessive. This aspect of his time must be substantially discounted, particularly since much of it was spent on what appear to be irrelevancies. On the affirmative side,

Mr. Wagshal worked energetically with full devotion to his client. His papers on the merits were of good quality and perceptive. The Court must also take into account that because of friction that arose between him and members of the class during the fee controversy it is not likely that there will be any repetitive business obtained from the class by reason of his efforts.

More and more, United States District Courts are being called upon to fix fees. There is no rule of thumb that can be applied and essentially the Court must exercise judgmental factors quite comparable to those employed by private attorneys when billing clients. The determination of a proper fee for legal services is not an exact science. A few considerations are generally applied in this community. Larger firms emphasize time billing of regular clients. Smaller firms have lower time charges and rely more on contingent arrangements, thus, in effect, becoming party to the litigation. All billing is designed to keep or develop the client. Where legal representation, is known to involve no prospect for future billing, fees are higher. There is no standard rate in this community even as between lawyers of comparable ability and responsibility. Some lawyers take into account their reputation and level of past earnings. All are concerned with whether the work has distracted them from other obligations. Results always affect the client's receptivity to the fee suggested. The practices of immediate competitors and a feel for the client's ability to pay must always be recognized. And so it goes.

When a judge sets a fee he seeks to get a feel for these factors, when applicable, intangible and uncertain as they may be. In addition, the Court must appraise the work of the attorney as he saw it from papers submitted and appearances in court.

In this case, like some other public interest litigation, the attorney seeks compensation from public funds created by Congress to serve a wholly different purpose. The attorney should be paid an adequate fee for his work but that is all. The attorney's interest and the public's cannot be differentiated and to a substantial degree he serves as an officer of the Court to help vindicate a right in the interested segment of the community that needed his help. Thousands of lawyers serve the Government at modest pay and perform services of equal import to the larger public interest. Those lawyers who choose the commendable course of serving the public interest rather than building a more remunerative commercial practice cannot expect the same financial awards as such practitioners sometimes achieve. The law is not a money-grubbing profession; windfalls should not be given to those who successfully represent persons not properly treated by our Government. Awarding of fees is not intended to accomplish other social purposes, nor is it the function of the Court to attempt to equalize financial awards for all types of legal work. Some legal fees in the private sector are excessive. It is becoming increasingly expensive to protect rights of citizens in court. It would be a gross mistake to make the highest level of charges in the private sector a measure of compensation to be paid all attorneys who seek to vindicate an identifiable public interest.

Taking into consideration that factors indicated and those delineated in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), and other pertinent cases, the Court has determined that a reasonable award for the time expended in this case is \$50,000, and that an additional \$15,000 should be awarded for the result, making a total fee of \$65,000 in full compensation for legal services rendered the class. This fee shall be paid by

H.E.W. from the fund directly to Mr. Wagshal for convenience, *see* *Wewoka, Okl. v. Banker*, 117 F.2d 839, 844 (10th Cir. 1941), after deducting \$13,216.24, representing attorney's fees already paid him by the National Council for his work in this case.. This amount of \$13,216.25 shall be paid directly by H.E.W. to the National Council for it to use solely to reimburse individual class members in like amounts for whatever each contributed to the sum paid out for fees.

In all other respects the applications are denied. Out-of-pocket costs are not to be paid from the fund but are to be assessed against H.E.W. in the regular manner through the Clerk of Court.

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-1335

**NATIONAL COUNCIL OF COMMUNITY MENTAL
HEALTH CENTERS, INC., ET AL.**

v.

**THE HONORABLE F. DAVID MATHEWS, INDIVIDUALLY
AND AS SECRETARY OF HEALTH, EDUCATION
AND WELFARE, ET AL.**

JEROME S. WAGSHAL, APPELLANT

No. 75-1353

**NATIONAL COUNCIL OF COMMUNITY MENTAL
HEALTH CENTERS, INC., ET AL.**

v.

**THE HONORABLE F. DAVID MATHEWS, INDIVIDUALLY
AND AS SECRETARY OF HEALTH, EDUCATION
AND WELFARE, ET AL., APPELLANTS**

**Appeals from the United States District Court
for the District of Columbia
(D.C. Civil Action 1223-73)**

Argued April 21, 1976

Decided November 9, 1976

Jerome S. Wagshal, appellant, *pro se*, in No. 75-1335 and appellee *pro se* in No. 75-1353.

Eloise E. Davis, Attorney, Department of Justice, with whom *Rex E. Lee*, Assistant Attorney General, *Earl J. Silbert*, United States Attorney and *Leonard Schaitman*, Attorney, Department of Justice, were on the brief for appellant in No. 75-1353 and appellee Mathews, et al., in No. 75-1335.

Guy W. Shoup for appellee, National Council of Community Mental Health Centers, Inc.

Charles R. Halpern and *Joseph Onek*, filed a brief on behalf of council for Public Interest Law as *amicus curiae*.

Before: TAMM, MACKINNON and ROEB, *Circuit Judges*

Opinion for the Court filed by *Circuit Judge TAMM*.

TAMM, *Circuit Judge*: This case arises out of a district court order awarding Jerome Wagshal a \$65,000 attorney's fee for successfully prosecuting a claim against the Department of Health, Education and Welfare (HEW) on behalf of the National Council of Community Mental Health Centers (NCCMHC).¹ The Secretary of HEW appeals from the district court's order that Wagshal's fee be paid out of unexpended federal grant funds. Wagshal also appeals arguing that the district court's reliance on a time basis computation formula instead of a percentage of the recovery formula resulted in an unreasonably low fee award. The NCCMHC argues in support of the district court's award

¹ The suit on the merits brought about the release of \$52 million of federal grants which had been authorized by Congress for fiscal year 1973 but which were illegally impounded thereafter by the President. *National Council of Community Mental Health Centers, Inc. v. Weinberger*, 361 F. Supp. 897 (D.D.C. 1973) (hereinafter referred to as NCCMHC I).

from the unexpended funds as it contends that the court lacked in personam jurisdiction over the individual class members and hence, was unable to charge them with payment of the fee.

Although we agree with the district court's determination of the amount of the fee and with its conclusion that it did not have the power to assess this fee against the individual class members, we find that the court erred in mandating that the attorney's fee be paid out of unexpended federal grant funds. We therefore reverse the judgment of the district court.

I. FACTUAL BACKGROUND

The federal grant funds involved here were part of the Congressional appropriations authorized under sections 220-224, 271 of the Community Mental Health Centers Act, 84 Stat. 56 (1970), *as amended* 42 U.S.C. §§ 2688-2688d, 2688u (Supp. V, 1975). The purpose of these grants is to assist public or non-profit private agencies in meeting the costs of construction of mental health facilities for children and to help pay part of the costs of the professional and technical personnel who operate these facilities. Responsibility for the administration of these grants lies with the Secretary of Health, Education and Welfare.

HEW released the impounded 1973 grants to the individual class members² after the proceedings on the merits indicated that they had been illegally withheld. A portion of these 1973 grant monies remained unused at

² In the suit on the merits the district court certified a class consisting of 138 community mental health centers, some of which are members of the National Council of Community Mental Health Centers, Inc., pursuant to FED. R. Civ. P. 23(b)(1) and (2). All of these individual class members had applied for first-year grants for fiscal year 1973. *NCCMHC, I*, 361 F. Supp. at 899-900.

the time Wagshal instituted his suit for a fee, almost one year after the conclusion of the litigation on the merits.³ Due to orders entered in the prior proceedings these unexpended funds did not lapse at the end of the fiscal year as would normally occur; rather, they were still subject to the control of the court.

The manner in which these federal grant funds are disbursed is particularly important here. Under normal operating procedures, the initial grant is made for the estimated cost of the first year of the project. Should this cost estimate be high in relation to the expenses incurred by the grantee in the first year, the surplus or unexpended funds are included in the computations for future grants. An estimate of the unexpended balances in all of the grantees' accounts at the end of a current budget period is made based on historical averages and then sufficient funds are appropriated to meet the next year's estimated grants. In this way, the unexpended federal grant funds are a significant factor which Congress takes into account each year in formulating the federal budget. See J.A. at 434-35. Should the grantee seek a continuation award for the next year, HEW computes the amount of the grant on the basis of the estimated cost of the program for that year less the grantee's matching funds and the unexpended balance remaining from the previous year's grant.⁴

The NCCMHC retained Wagshal pursuant to an agreement which provided that the NCCMHC would pay him a minimum hourly fee and expenses (amounting to \$13,216.25), and if the litigation were successful, an additional fee would be sought from the benefitting class

³ National Council of Community Mental Health Centers, Inc. v. Weinberger, 387 F. Supp. 991, 994 (D.D.C. 1974) (hereinafter referred to as *NCCMHC II*).

⁴ See Affidavit of John P. Spain, J.A. at 433-34.

members through application to the court.⁵ These benefiting class members were not parties to the retainer agreement and the district court was not aware at the time of certification that attorney's fees would be sought from them.⁶ Wagshal made no reference to his fee arrangement in any of his original pleadings. The class members were only informally advised of the retainer provisions by the NCCMHC. No evidence that they agreed to or understood the implications of the agreement was submitted to the district court.⁷ None of the class members were ever given an opportunity to opt out of the litigation and none appeared by separate attorney in this fee application case.

II. ISSUE ANALYSIS

The long-standing "American rule" on the payment of attorney's fees in the absence of a statute or enforceable

⁵ The retainer provision in the agreement reads:

II. *Class Fee*

It is understood that the above hourly rate [\$35.00] and initial retainer is substantially less than would normally be charged for a matter of this nature. The proposed action will be filed as a class action on behalf of a class of community mental health centers, as well as the National Council. If, as a result of this litigation, a substantial benefit is conferred upon the plaintiff class, it is agreed that we will apply to the Court for an appropriate fee award from those class members benefiting therefrom. The Court-determined counsel fee would not be drawn in any measure from the National Council, whose obligations are fully stated in the preceding paragraph. In determining the appropriate amount of counsel fees to be awarded with respect to class members, the Court will be advised of and take into account the amount of funds provided by the National Council.

Wagshal Brief at 12 n.15.

⁶ *NCCMHC II*, 387 F. Supp. at 993.

⁷ *Id.* at 993-94 n.1.

contract is that each party pays his own. This rule however is not absolute. Over the years, judicially-created exceptions have been grafted onto the rule. A successful party can now be awarded attorney's fees if his opponent has acted in bad faith or if a substantial benefit has been conferred on a class of persons.⁸ *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 245 (1975). The problem which faces us is determining whether an exception to the American rule is applicable here.

The most troublesome obstacle which we encounter is embodied in 28 U.S.C. § 2412 (1970) which provides:

Except as otherwise specifically provided by statute, a judgment for costs, as enumerated in section 1920 of this title *but not including the fees and expenses of attorneys* may be awarded to the prevailing party in any civil action brought by or against the United States or any agency or official of the United States acting in his official capacity, in any court having jurisdiction of such action. A judgment for costs when taxed against the Government shall, in an amount established by statute or court rule or order, be limited to reimbursing in whole or in part the prevailing party for the costs incurred by him in the litigation. Payment of a judgment for costs shall be as provided in section 2414 and section 2517 of this title for the payment of judgments against the United States.

(Emphasis added). If we find that the unexpended grant funds belong to the United States rather than to the grantees and we cannot find a specific statute providing for the award of attorney's fees against the United

⁸ See also *F.D. Rich Co. v. United States ex rel. Industrial Lumber Co.*, 417 U.S. 116, 129-30 (1974); *Hall v. Cole*, 412 U.S. 1, 4-5 (1973); *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 718-19 (1967).

States in this situation, the district court's fee award cannot be upheld.

We find that the manner of disposition of these unexpended funds is conclusive evidence of their true ownership. As noted previously, these unexpended funds are one factor taken into account in determining the amount of future grants which each grantee will receive. These funds do not remain at the grantee's disposal if they have not been "expended" by the end of the fiscal year.* It is only through a subsequent continuation grant approved by HEW that a grantee can again reach these unexpended funds which it failed to use the previous year. These unexpended funds are thus in the safekeeping of the public treasury until their use is once again authorized. *See* 42 Comp. Gen. 289, 294 (1962). An award of attorney's fees from these funds therefore would be an award against the United States and contrary to 28 U.S.C. § 2412, unless another statute specifically authorizes this award.

No statute has been brought to our attention which changes the rule of section 2412 in this situation. The authorization legislation for the appropriation of these funds includes a detailed listing of the purposes for which these grant monies are to be used. Community Mental Health Centers Act, §§ 220, 271, 42 U.S.C. §§ 2688, 2688u (1970). These purposes do not include the payment of attorney's fees. Similarly, the HEW implementing regulations do not provide for the payment of attorney's fees such as are sought here. *See* 42 C.F.R. § 54.303 (1975). Indeed, one subsection of the uniform adminis-

* "[F]unds can be 'expended' only by disbursing them to grantees pursuant to a billing for costs incurred, or a request for an advance payment for costs to be incurred, in the operation of grant supported projects." J.A. at 432.

trative requirements and cost principles regulations which apply to these grants¹⁰ provides:

(d) Costs of legal, accounting and consulting service[s], and related costs, incurred in connection with . . . the prosecution of claims against the Government, are unallowable.

45 C.F.R. Part 74, Subpart Q, Appendix F, § G-31(d) (1975). As these unexpended grant funds belong to the United States until HEW approves a subsequent continuation grant, and there is no specific statutory authorization for an award of attorney's fees against the United States which is applicable here, no attorney's fee may be awarded out of unexpended grant funds as the case falls squarely within the strictures of 28 U.S.C. § 2412. See *Pyramid Lake Paiute Tribe of Indians v. Morton*, 449 F.2d 1095, 1096 (D.C. Cir. 1974), *cert. denied*, 420 U.S. 962 (1975).

The district court sought to circumvent this statutory prohibition by relying on its historic equity jurisdiction to award attorney's fees as costs "as between solicitor and client."¹¹ The exception it applied is commonly referred to as the "common benefit" or "common fund" exception. This exception means that if a party preserves or recovers a fund for his benefit and the benefit of others, he is entitled to recover his costs, including attorney's fees, from the fund or directly from the other parties enjoying the benefit. *National Treasury Employees Union v. Nixon*, 521 F.2d 317, 320-21 (D.C. Cir. 1975). The district court premised its application of this exception on a finding that the United States is a mere

¹⁰ 42 C.F.R. § 54.309 (1975).

¹¹ *NCCMHC II*, 387 F. Supp. at 994. See also *Sprague v. Ticonic National Bank*, 307 U.S. 161, 164-65 (1939); *Lafferty v. Humphrey*, 248 F.2d 82, 84 (D.C. Cir.), *cert. denied sub nom. Benton County v. Lafferty*, 355 U.S. 869 (1957).

“stakeholder” of the unexpended funds at issue here.¹² In doing so, it relied on *Lafferty v. Humphrey*, 248 F.2d 82 (D.C. Cir.), *cert. denied sub nom. Benton County v. Lafferty*, 355 U.S. 869 (1957). *Lafferty*, like the case *sub judice*, was a fee application case which arose out of a prior case on the merits which ordered the disbursement of certain land-grant funds improperly withheld by executive officials. *Clackamas County v. McKay*, 219 F.2d 479 (D.C. Cir. 1954), *vacated as moot*, 349 U.S. 909 (1955). However, the legislation providing for these funds in *Clackamas* specifically directed the executive officials “to disburse the balances left at the end of each year.” *Id.* at 487. As the discussion *supra* indicates, this is contrary to the manner in which Congress has appropriated the grant funds with which we are concerned. Instead of providing for the complete expenditure of all grant funds each year, the legislature has relied on a certain surplus of funds from previous years to act as “seed money” for the following years’ grants. See J.A. at 434. The government’s position as “stakeholder” is *Clackamas* and *Lafferty* therefore¹³ allows the award of counsel fees from those grant funds as all of those funds belonged to the grantees. This is not the case here. The United States is more than a mere stakeholder in this instance. It is the owner of the unexpended grant funds. The application of the common fund rule then immediately collides with the express provision of 28 U.S.C. § 2412.¹⁴ We are therefore constrained to follow the specific statutory prohibition and disallow the award of attorney’s fees under the common fund rationale.

¹² *NCCMHC II*, 387 F. Supp. at 994.

¹³ *Lafferty v. Humphrey*, *supra*, 248 F.2d at 84.

¹⁴ The Supreme Court has recently recognized (but not resolved) the conflict arising between 28 U.S.C. § 2412 and judicially-created exceptions to the “American rule” when

The only other avenue of relief available to Wagshal is for the court to charge the individual class members with his \$65,000 attorney's fee. As the district court discussed in full,¹⁵ this alternative is not open to us. The class was properly certified under FED. R. CIV. P. 23(b) (1) and (2) for the purpose of litigating the merits of the impoundment case because the NCCMHC adequately represented the interests of the class members in that suit. However, the NCCMHC does not represent the interests of the individual class members in this fee application case. In this suit it merely seeks the return of its initial fee payment to Wagshal and supports the payment of his fee from the unexpended grant funds. As none of the individual class members ever made an appearance before the district court and there was no one else present to adequately represent their interests in the fee case, the district court properly found that it lacked in personam jurisdiction over the class and therefore could not award the fee against them. *Hansberry v. Lee*, 311 U.S. 32 (1940). One of the touchstones of due process required by a Rule 23 class action which was sorely lacking here, is that the class be adequately represented. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176 (1974). Wagshal should have provided in his retainer agreement for full payment of his fee or else he should have structured his pleadings in the district court in such a way as to inform the court and class members that he would be seeking an additional fee if he were successful on the merits.

Finally, Wagshal contends that the amount of his fee should have been determined on a quantum meruit basis

the United States or an agency thereof is a party to the litigation. *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 265-68 (1975).

¹⁵ *NCCMHC II*, 387 F. Supp. at 993-94.

which would have resulted in a fee equal to a certain percentage of the \$52 million released by HEW. We find that the district court properly followed the guidelines set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974) which this court adopted in *Evans v. Sheraton Park Hotel*, 503 F.2d 177, 188 (D.C. Cir. 1974),¹⁶ and that the fee of \$65,000 was an eminently reasonable award in this case.

III. CONCLUSION

Although we recognize that Wagshal has rendered a significant service on behalf of the community mental health centers we cannot award him a reasonable fee. Title 28 U.S.C. § 2412 prevents us from charging the fee against the unexpended federal grant funds and the lack of in personam jurisdiction over the individual class members makes a fee award against them impossible. As the Supreme Court has recently stated, Congress has not "extended any roving authority to the Judiciary to allow counsel fees as costs or otherwise whenever the courts might deem them warranted." *Alyeska Pipeline Service Co. v. Wilderness Society*, *supra*, 421 U.S. at 260. The district court's award of attorney's fees must therefore be reversed.

So ordered.

¹⁶ See also Dawson, *Lawyers and Involuntary Clients in Public Interest Litigation*, 88 HARV. L. REV. 849 (1975).

UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit

September Term, 1976

Civil Action 1223-73

No. 75-1335

National Council of Community Mental Health Centers,
Inc., et al.,

v.

The Honorable F. David Mathews, individually and as
Secretary of Health, Education and Welfare, et al.

Jerome S. Wagshal,

Appellant.

Civil Action 1223-73

No. 75-1353

National Council of Community Mental Health Centers,
Inc., et al.,

v.

The Honorable F. David Mathews, individually and as
Secretary of Health, Education and Welfare, et al.,

Appellants.

BEFORE: Tamm, MacKinnion and Robb, Circuit Judges.

[Filed January 13, 1977]

ORDER

On consideration of the petition for rehearing filed
by appellee-cross appellant Wagshal, it is

ORDERED by the Court that the aforesaid petition
for rehearing is denied.

Per Curiam

For the Court:

/s/ George A. Fisher

George A. Fisher

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